



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-179888

October 26, 1973

40107

Verner, Lipfert, Bernhard and McPherson
Suite 1100
1660 L Street, NW.
Washington, D. C. 20036

Attention: James H. Verner, Esquire

Gentlemen:

We refer to your letter dated June 12, 1973, on behalf of Northwest Airlines Incorporated, protesting the award of a contract to United Airlines, Incorporated (United), under invitation for bids (IFB) No. 73-60, issued by the Department of State, Washington, D. C.

The State Department's IFB was for two one-way charter cargo flights, in other than B-747-type equipment, from Newark, New Jersey, to Peking, Peoples Republic of China. One flight was to be operated on or about June 20, 1973, and the other on or about June 26 or 29, 1973. The solicitation called for lump-sum (firm fixed-price) bids for each flight, and the Government reserved the right to award either in the aggregate for both flights or separately for each flight, on the basis of price per usable cubic foot of cargo capacity. The IFB further required that "reasonable arrangements" be made for a departmental representative to accompany both aircraft to Peking and thence to the first stop outside the Peoples Republic of China.

Five bids were recorded at the bid opening held on May 31, 1973. United's letter bid offered the following terms, with respect to both flights:

"A. I: State Department representative will ride
in cockpit - Price \$23,300. Usable cubic feet
3702.

"B. If no requires seat in cabin - Price \$26,790.65.
Usable cubic feet 7068 * * *."

It appears that through inadvertence, United's alternate bid "A" was not read aloud at the bid opening. Upon discovery of this omission several hours later, all bidders were telegraphically advised of the existence of the alternate "A" bid. Award of a contract for both flights subsequently was made to United pursuant to a determination that the alternate bid "A" offered a lower price per usable cubic foot of cargo space.

[Protest of Contract Awarded by Department of State]

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We shall respond to each of the arguments advanced by you in the order in which they are presented in your letter dated June 12, 1973. First you allege, and the procuring agency concedes, that United's "A" bid was not read aloud at the bid opening, even though Federal Procurement Regulations (FPR) 1-2.402(a), in its pertinent part, states that:

"All bids received prior to the time set out for opening shall then be publicly opened and, when practicable, read aloud to the persons present, and be recorded."

However, it has not been shown that Northwestern was prejudiced by the failure to read aloud United's entire bid, nor has any explanation been offered as to why Northwestern's two representatives present at the bid opening did not examine all the bids immediately thereafter, as permitted by FPR 1-2.402(c). Moreover, we cannot discern what adverse effect this procedural deficiency had upon the validity of United's bid. We therefore find no merit to your first contention.

You next maintain that United's "A" bid was a conditional bid which should not have been accepted. Our Office has upheld the rejection of bids for nonresponsiveness which are predicated upon conditions which constituted material deviations from the terms of solicitations. See, e.g., B-166360, April 17, 1969, copy enclosed. In the instant case, the solicitation required the contractor to provide "reasonable arrangements" for a State Department representative to accompany the flight. United's bid offered a choice of accommodations which in turn affected the volume of usable cargo capacity. The procuring agency, exercising the discretion permitted to it, determined that United's "A" bid (which offered the lowest price per usable cubic foot of cargo capacity) made "reasonable arrangements" for the departmental representative. Under these circumstances, we do not regard United as having submitted a bid upon a condition which deviated from the material requirements of the IIB. Rather, we think United submitted an alternate bid, which was not prohibited by the solicitation, in compliance with the terms of the solicitation.

The solicitation also provided that award would be made on the basis of "price per usable cubic foot." You argue that the type of materials to be transported (office, residential, and technical equipment and supplies), to be transported from Denver, should

was upon this basis that you computed your bid. In contrast, United contemplated the use of bulk loading, which permits fuller utilization of the cargo space within the aircraft, and which results in a lower price per cubic foot. You state that you did not reasonably anticipate that "usable" cargo capacity could be obtained through bulk loading, and you maintain that you should have an opportunity to bid upon the same basis as United.

The concept that palletized loading was required appears to have arisen through an assumption on your part, unexpressed to the procuring agency, and not through the terms of the solicitation. "Usable cubic foot" was not restricted by the IFB to palletized loading, and we are advised by the Department of State that it considered bulk, as well as palletized, loading to be acceptable. We therefore believe that the solicitation did not lead bidders to bid on different bases.

After the bids had been opened and it was known that United's successful bid was based upon bulk loading, you offered to perform the flights at your original bid price but with a larger cargo capacity obtained by switching from palletized to bulk loading. We think the procuring agency properly rejected this offer, pursuant to FPR 1-2.305, as a late modification to an otherwise unsuccessful bid.

Finally, you maintain that United's bid should have been rejected for its failure to identify the "type" of aircraft to be used in performance of the contract, which information was requested by the IFB. The procuring agency did not obtain this information from United until after bid opening. You suggest that information concerning the type of aircraft to be used is a vital part of the bid because it is needed to establish that the bidder had equipment capable of successfully fulfilling the contract requirements, and you express the belief that in the absence of such information, the contract might be let to a nonresponsible firm.

We agree with your conclusion that the aircraft type submission requirement would enable the contracting officer to determine in advance of award whether the firm awarded the contract could perform responsibly. Where the requirement for submission of data is for the purpose of determining the capacity or responsibility of the bidder, the failure of the bidder to furnish such data in his bid for such use is not fatal to consideration of the bid, inasmuch as a bidder's capacity or

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responsibility may be determined on the basis of information submitted after bid opening. See FPR 1-1.1205-2.

Furthermore, the provision in the invitation requesting information on the type of aircraft to be used was inserted for the convenience of the Government and in no way affects the rights of competing bidders. The low bidder legally could not have refused to accept award of the contract on the ground that its bid was defective in that it did not include the information requested. In such circumstances strict compliance with the requirement may be waived by the Government as an informality. 39 Comp. Gen. 881 (1960).

Accordingly, your protest is denied.

Sincerely yours,

Paul G. Deubling

For the Comptroller General
of the United States

Enclosure